

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 February 2006

CASE NO.: 2005-LDA-59

OWCP NO.: 02-138009

IN THE MATTER OF

ROBERT PURCELLA,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

Quentin D. Price, Esq.,
On behalf of Claimant

John L. Schouest, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, (2000) brought by Robert Purcella (Claimant) against Service Employers International, Inc., and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was

referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on August 23, 2005, in Beaumont, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called one live witness (Joseph Talbot) and introduced 23 exhibits which were admitted including various DOL forms; deposition of Ms. Starla Harrison; medical records of Dallas Metro Care Services, Carolina Behavioral Care, KBR, and Dr. Robert Hebert; Claimant's income tax information, employment contract, exit interview, wage printout; e-mail correspondence between Employer and Claimant, Employer's answers to discovery, job description and photographs, Employer operation policies and medical records of Drs. John G. Mc Henry, John Seifert, Marcia Coben, F. H. Pureshi and Pierre Herding¹ Employer introduced 19 exhibits which were admitted including Claimant's employment contract, pre-employment physical, recorded statement, answers to discovery, wage and tax information, personnel and earnings records; various DOL forms; medical records of Drs. Gerald Keehn, Gregory Mincey, John McHenry and Robert Herbert, Carolina Behavioral Care, Dallas Metrocare, Parkland Hospital; depositions of David Smithhart and Starla Harrison; and Employer injury report. The parties introduced one joint exhibit.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness, demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant's last date of employment was March 5, 2004.
2. Employer filed a notice of controversion on December 28, 2004.
3. An informal conference was held on April 27, 2005.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation: existence of a compensable injury-whether Claimant suffered from PTSD as a result of his employment with Employer in Iraq.

¹ References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-____, p.____; Employer exhibits- EX-____, p.____; Joint exhibit- JX-____; p.____.

2. Date employee notified Employer of injury.
3. Nature and extent of injury.
4. Section 7 medical benefits.
5. Average weekly wage. (AWW).
6. Attorney fees, expenses, interest, and penalties.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 41 year old male born on September 20, 1963 (Tr. 22). Claimant has a GED, plus a year of technical training in radiation physics at TSTC in Waco. Claimant served in the U.S. Army from 1980 to 1982. Following his discharge he worked installing drywall for 4 drywall companies from 1982 to 1989 followed by work as a contract mover for United Van Lines and Wharton Van Lines from 1991 to 2003, when employed by Employer also referred to as KBR (Kellogg Brown and Root) as a heavy truck, convoy driver. (EX-11; Tr.22, 23, 27, 90, 94, 108). Claimant worked for Employer from November 15, 2003 through March 5, 2004 making \$25,861.00 (CX-10, EX-9, 15).² In his exit interview with Employer, Claimant complained about lack of proper medical care for right eye, left shoulder injuries and breathing problems (CX-9, p. 2).³

From February 2, 1987 to February 27, 1987, Claimant was hospitalized at the Veterans Administration Medical Center in Dallas, Texas for a major depressive, dissociative, and intermittent explosive disorder. This was followed by outpatient treatment at the Dallas County Mental Health and Mental Retardation Center from March 23, 1987 through June 30, 1987 (EX-8; pp. 59-79). In January 1989 Claimant suffered a flash burn too his back face, arms and hands and was treated for this condition and Post Traumatic Stress Disorder (PTSD) from January 10

² In 2003, Claimant made \$46,648.00 driving for Metroplex Movers and \$3,106.00 from Employer. In 2004, Claimant earned \$22,755.00 while working for Employer. (CX-6).

³ This case involves only compensation for depression and PTSD. Dr. John G. McHenry examined Claimant's eyes on June 5, 2005 and found Claimant a glaucoma suspect, but otherwise. The exam was normal. (EX-6). An earlier eye exam of May 25, 2004 was also normal except for a right eye inflammation. (EX-4). An eye exam of August 17, 2004 was also normal (EX-5).

through February 5, 1989 at Dallas County Hospital District. (EX-9). Claimant had no other psychiatric problems until his employment with Employer in Iraq, and apparently until recently, had no memory of this treatment. (Tr. 23-26, 31). Claimant also injured his back in 1986 and 1989, but had no problem in passing Employer's physical in 2003 and earning substantial income from 1989 to 2003. (Tr. 27-30).

As a convoy driver Claimant was frequently exposed to potentially life threatening situations. (CX-13, p. 1). Initially, Claimant was assigned to work at TMK Kuwait driving a flatbed truck. Shortly thereafter he was moved to Cedar, Iraq and assigned to drive sustainer missions delivering water, food, supplies including ammunition to the military under the supervision of foreman David Smithhart. During these missions while driving routes referred to as Tampa and Orlando from Cedar to Scania too Anaconda and return, he was attacked on 4 separate occasions by improvised explosive devices (IEDs) and rocket propelled grenades (RPG) wherein truck windows, tires and frames were blown out. (Tr. 34-38, 96-98). On one of these occasions Claimant was driving on Market Street by Taji when attacked, but was able to escape unharmed. On another occasion, Claimant was shot at while driving south of Baghdad bullets broke his windshield causing glass to fly in his face and right eye. (Tr. 40, 41, 48-52; CX-18). Claimant received medical attention for this condition in Scania where he had his eye flushed, salve and eye patch applied. (Tr. 58).

On almost every daily trip Claimant's convoy came under attack. (Tr. 53). On one trip as Claimant was driving through Sanawah, his convoy was stopped when two cars jumped in the convoy and stopped. Insurgents started taking stuff off his trailer and tried to pull him from the truck. Claimant took a hammer and hit a man twice in the head cracking his skull wide open, Claimant pushed him aside, slammed the door, put the truck in gear, shoved the two cars in front of him out of the way and kept driving. (Tr. 54, 55). The military had given instructions not to stop. On occasion, in following such instructions, Claimant ran over civilians as they attempted to stop the convoy. (Tr. 56, 57).

Concerning PTSD Claimant testified he got "pretty stress out" and was sent in February, 2004, to Kaliefa where medical staff for Employer took him to a military hospital. There a doctor told him he was suffering from combat fatigue. (Tr. 59). Claimant asserts he was sent home because of excess stress. His exit papers show he left for personal reasons, one of which was to see a sick mother. Claimant denied marital problems were the cause of his return. (Tr. 60, 61). Upon his return to the United States, Claimant sent an E-mail to Employer representative, Wendy Byers, detailing medical problems he had in Iraq including eye, left shoulder injury from falling while trying to hook up a trailer in Anaconda, and hearing problems from IEDs. Ms Byers responded that she had difficulty getting information out of Kuwait and Iraq and apparently could get no information regarding the eye injury. (CX-8, p. 3; Tr. 63, 64).

Employer provided no post-employment examination or evaluation of Claimant when he returned to the U. S. (Tr. 66). However, they did authorize 8 counseling sessions at Carolina Behavioral Care. (CX-5, Tr. 67, 68). This was followed by treatment at Dallas Metro Care Services, which Employer has refused to provide. (Tr. 69). Claimant continues to treat at Dallas Metro Care for PTSD. He confines himself primarily to his house, is unable to drive, and has difficulty sleeping, flashbacks of Iraq and panic attacks. (Tr. 79-81).

On cross, Claimant admitted signing an employment at will contract with Employer wherein Claimant could be terminated at any time and while employed would receive hazard pay due to hazardous areas where he would work. Claimant admitted prior to being employed, filing out a medical questionnaire, denying any past history of mental illness because of a lack of memory of such. (EX-1,2, 8; CX-7; Tr. 82-88). Claimant now remembered being hospitalized for about a month in 1987 at a VA hospital, and subsequently treated at a clinic for mental problems. (Tr. 89, 90, 92).

Claimant admitted making about \$50,000.00 in 2003, for two moving companies and earning \$25,861.85 while working for Employer. (Tr. 94-96; EX-16, p. 3). Concerning the convoy attacks, Claimant testified that the convoy commander would fill out incident reports on each with Claimant signing reports when he was injured. (Tr. 101-102). On one incident when Claimant hammered an insurgent, Smithhart approached him long after the event and asked him what happened. (Tr. 103).

B. Testimony of Jerry Talbot

Talbot was employed as a convoy driver by Employer in Iraq from December 14, 2003 through June 29, 2004. Part of that time, Talbot drove in the same convoy from Cedar with Claimant. (Tr. 117, 118). Talbot described being pelted by boulders on convoy runs. (Tr. 120). Talbot testified that everyday his convoy came under attack, not only from boulders but small arms, IEDs, mortars, and RPGs. (Tr. 122, 123). Besides direct attacks, insurgents would try to stop convoy by ramming the convoy with trucks or cars or pushing people in front of moving vehicles. If a driver hit a person he and other drivers would continue driving following military instructions so as not too jeopardize the convoy. Upon returning to camp the drivers did not talk about such incidents. David Smithhart who served as a temporary foreman while the head foreman was on leave, never left with the convoy, but rather, stayed at the camp and thus, did not see drivers run over and kill people. Talbot moreover, was not in Claimant's convoy when Claimant was hit, but did observe him wearing an eye patch during driver conferences conducted by Smithhart. Talbot filed a work compensation claim against Employer because of his work in Iraq. (Tr.124- 132).

C. Testimony of Starla Harrison

Ms. Harrison, a psychiatric mental health nurse practitioner with a B.S. in Nursing and a M.S. in psychiatric mental health nursing, started working at Dallas Metro Care in August, 1988, and has over 17 years of psychiatric nursing experience. As a psychiatric mental health nurse practitioner she is licensed by federal and state law to prescribe medications, and at Dallas Metro Care has the same job description as a psychiatrist and works under the supervision of a psychiatrist. (CX-4; CX-3, pp. 6, 7). Dallas Metro Care provides mental health care for indigent people who live in Dallas County, and was formerly known as Dallas County MHMR. (CX-3, p. 8).

Ms. Harrison testified that she first saw Claimant at Dallas Metro Care on May 5, 2005 and discovered he was having severe daily panic attacks, trouble controlling his temper, and paranoid feelings. Claimant reported feelings of sadness, worthlessness, and hopelessness with flashbacks and nightmares about his experiences in Iraq. At that time, Claimant was living in a garage. (Id. at 13). Claimant described his work in Iraq, wherein he was told to run over citizens if they got in the way and an incident where he had to beat a guy with a hammer to get him off his truck. (Id. at 14). Ms. Harrison diagnosed Claimant as having a major depressive disorder with PTSD related to his experiences in Iraq with a global assessment of functioning at 39 indicating an inability to function in daily life or to work. (Id. at 17-20). Ms. Harrison prescribed an anti-depressant and anti-anxiety medication, Celexa plus, Trazadone and Klonopin. (Id. at 21). Subsequently, Ms. Harrison has continued to see Claimant every two to four weeks with Claimant undergoing behavioral and psychosocial rehab as well. (Id. at 31).

Ms. Harrison testified that Claimant was treated in 1978 at Dallas County MHMR and again in 1987, after being discharged from the VA hospital psyche unit for PTSD. (Id. at 32). Ms. Harrison testified that anytime a person experienced an episode of mental illness or psychological trauma it takes much less trauma for the symptoms to show up again or for the prior illness to reappear. (Id. at 33).⁴

D. Testimony of David Smithhart

Smithhart who currently works for Employer as a truck driver in Uzbekistan and formerly as a transportation foreman over flatbed trucks moving through Iraq from April, 2003, through May, 2004, supervised flatbed truck drivers in Iraq and was the company person responsible for receiving driver reports of injuries and attacks. (EX-18, p. 3) Smithhart testified that Claimant worked under his supervision for about 5 to 6 months and talked to him on a regular basis. Smithhart had no recollection of Claimant sustaining an eye or left shoulder injury. Further he could not recall Claimant reporting a hearing loss, respiratory breathing problems or having his truck struck by bullets or explosive devices or working light duty. (Id. At 4, 5). Smithhart did not often ride in the convoys and kept a daily log of events, but could not find it although it was e mailed throughout the camp. (Id. at 11, 12).

Smithhart admitted it was common for trucks to be either stoned or shot at, but did not know how often the convoy was attacked by IEDs or RPGs. (Id. at 13). Further, it was common for Iraqis to attempt to stop the convoys. (Id. at 16).

⁴ Carrier had Claimant evaluated by psychiatrist, Dr. Robert J. Hebert, on June 16, 2005. After taking a history, examining Claimant, and studying treatment records, Dr. Hebert diagnosed PTSD related to Claimant's experiences in Iraq, and opined he did not know if Claimant could work, but would not be able to return to work in a war zone, or drive a truck anywhere. (EX-17). A review of the Carolina Behavioral Care records also shows treatment and diagnosis for major depressive disorder, PTSD, and possible intermittent explosive disorder. (EX-7).

IV. DISCUSSION

A. Contention of the Parties

The primary issue in this case, is Claimant's credibility with regard to his contending he was subjected to multiple life threatening incidents, which either caused or aggravated an underlying PTSD condition, and which produced left shoulder, right eye and hearing problems. Claimant points to CX-14, a March 3, 2004 Employer report, showing Claimant injuring his left shoulder as a result of a fall from his trailer. This is followed by an MRI of the left shoulder on May 27, 2004, showing acromioclavicular joint hypertrophy with joint space narrowing, articular surface irregularity and extensive reactive marrow edema narrowing resulting in severe lifting restrictions. (CX-24). Claimant also points to the fact he reported not only shoulder, but eye, and hearing problems to Employer on March 10, 2004 exit interview, and March 15, 2004 e-mail to Ms. Byers and which problems were substantiated by subsequent medical examinations. (CX- 8, 9 p. 2; CX-22, 23, pp. 1-3).

Claimant argues that Employer is directly responsible for any lack of documentation because Smithhart kept, but failed, to produce daily reports of driver activities and hostile encounters. Moreover, Smithhart had either limited knowledge of driver activities because he went on only 5 convoy runs, or poor recollection. However, given those circumstances Smithhart was still aware of frequent and severe convoy attacks.

Concerning Claimant's PTSD, all medical providers associated this condition with Claimant's war experiences in Iraq. Further, Ms. Harrison and Dr. Hebert agree that Claimant needs further treatment for PTSD and cannot work as a truck driver. Since Employer showed no suitable alternative employment, Claimant is entitled to temporary total disability. Concerning average weekly wage Section 10 © should be used because Claimant did not work substantially the whole of the year immediately preceding the injury, was a 7 day a week worker, and Employer produced no wage data on comparable employees. Under Section 10 © Claimant's AWW should be determined by taking Claimant's gross wages of \$34,405.85 while working in Iraq, and dividing that by 17 weeks of actual work resulting in an AWW of \$2,023.87 pursuant to *Zimmerman v. Service Employers International, Inc.*, 39 BRBS 166 (ALJ, 2005). Further, medical benefits should be provided pursuant to Section 7 as well as interest and attorney fees.

Employer on the other hand, argues that Claimant did not suffer PTSD from his work in Iraq, in that there is no corroboration of the incidents alleged by Claimant which contributed to his PTSD, which condition Claimant had prior to his employment with Employer. Talbot had no first hand information about theses incidents and testified only about what he heard. Claimant offered no incident reports and Smithhart had no recollection of these incident. Moreover, there is no medical documentation of Claimant being treated for PTSD or eye problems while in Iraq. And no mention of PTSD on either the exit interview or e-mail correspondence with Ms. Byers. Alternatively, if Claimant suffered from PTSD as a result of his employment in Iraq, such condition is an aggravation of a pre-existing condition entitling Claimant to no more than temporary total disability benefits with his AWW determined by using Section 10 (a) taking what he earned from Metroplex Movers, and adding to that what he earned from Employer and

dividing that by 52 resulting in an AWW of \$1,187.39. Further, the wages Claimant earned in Iraq are irrelevant to a determination of AWW because lied on his application and presumably would not have been hired for work in Iraq.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case, I was impressed with Claimant's sincerity and honesty. Claimant's testimony was consistent with admitted hostile and warlike conditions of Iraq in which truck convoys were routinely attacked by bullets, IEDs and RPGs. The absence of any written documentation especially daily supervisory from Smithhart, plus Smithhart's admitted failure to accompany convoys, further supports Claimant's assertion that Smithhart was ill informed about his and other driver safety. Claimant's assertion that he suffers from PTSD associated with his Iraq was supported by not only Claimant but Employer medical records. Indeed, I find no reason to discredit his testimony as Employer would have me do.

C. Causation

Section 2(2) of the Act defines injury as an accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary

--

(a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the

course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp., v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a mere fancy or wisp of what might have been. *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's un-contradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that condition existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S. Ct. 825 (Dec. 1, 2003) (stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv., Corp.*, 29 BRBS 18, 20 (1995) (stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87

(1935); *Port Cooper/T Smith Stevedoring Co., v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

In this case, Claimant established a *prima facie* case for employment related PTSD by showing Claimant sustained trauma from convoy attacks which occurred on a frequent basis. Employer present no evidence to rebut Claimant's testimony except to rely upon the absence of company records, and Smithhart's testimony about a lack of recollection of the incidents Claimant described which I find unpersuasive. Assuming Employer rebutted the *prima facie* case, I find weighing the records as a whole that Claimant clearly established by a preponderance of credible evidence that he sustained PTSD as a result of violent encounters in Iraq.

D. Nature and Extent of Injury

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. §902 (10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In this case, Claimant has clearly shown by treating source records both an inability to work plus a need for continuing treatment for PTSD thereby establishing his entitlement to temporary total disability. This was confirmed in large measure by Employer's psychiatric medical examination conducted by Dr. Hebert.

E. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

1. Section 10(a)

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a); *see also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000) (stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). In this case, Section 10 (a) appears to be inapplicable because of Claimant's 7 day work week.

2. Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked

substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). The record contains no information about any comparable workers. Hence Section 10 (b) cannot be applied.

3. Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly," then a determination of a claimants average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 1292(9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

In using Section 10© I find it inappropriate to use only his earnings in Iraq divided by 17 weeks of work, due to the fact that Claimant's contract for employment was only for one year and the unlikelihood, as argued by Employer, Claimant would have been hired had he disclosed

his past history of mental illness. Rather I find a more accurate measure of his earnings is to combine which he earned from Metroplex as a driver in 2003, (\$46,648.00) with his earnings from Employer (\$25,861.00), and divide that sum (\$72,509.00) by 52 resulting in an AWW of \$1,394.41.

F. Medical Benefits

Section 7(a) of the Act provides that “the employer shall furnish such medical, surgical, and other attendance or treatment...for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the AU). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36(1989); *Mayjeld v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). In this case, it is clear Employer has an obligation to pay for not only Claimant’s past treatment for PTSD following his employment termination, but future mental health treatment for such a condition.

G. Interest and Penalties

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff’d in pertinent part and rev’d on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that... the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills...” *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for specific administrative application by the District Director.

Section 14(e) of the Act provides:

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e) (2002). *See also National Steel & Shipbuilding Co., v. Bonner*, 600 F. 2d 1288, 1294 (6th Cir. 1997); *Garner v. Olin Corp.*, 11 BRBS 502 (1979).

Assessment of a Section 14(e) penalty ceases whenever the employer complies with the requirements of Section 14(d) and files its notice of controversion. *Oho v. Castle and Cooke Terminals, Ltd.*, 9 BRBS 989 (1979) (Miller dissenting); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989). If the employer fails to file a notice of controversion, the Section 14(e) penalty runs until the date of the informal conference. *Grbic v. Northeast Stevedoring Co.*, 13 BRBS 282 (1980) (Miller dissenting). Even when the employer voluntarily pays compensation, the Section 14(e) penalty is applicable to the difference between the amount voluntarily paid and the amount determined to be due. *Alston v. United Brands Co.*, 5 BRBS 600 (1977). An employer, however, is not required to file a notice of controversion until a dispute arises over the amount of compensation due. *Mckee v. D. E. Foster Co.*, 14 BRBS 513 (1981). When an employer files a notice of controversion and an additional controversy subsequently develops for which the employer suspends payments, the employer should file an additional notice of controversion. *See Harrison v. Todd Pacific Shipyards*, 21 BRBS 399 (1998) (stating that an employer is relieved of filing a second notice of controversion after the informal hearing). The language of Section 14(e) is mandatory, and any stipulation agreeing to waive the “additional compensation” is presumably invalid under Section 15(b) of the Act. 33 U.S.C. § 915(b); *Nulty v. Halter Marine Fabricators, Inc.*, 1 BRBS 437 (1975).

Since Employer admittedly knew of Claimant’s injury on October 11, 2004, and did not file a Notice of Controversion until December 28, 2004, it failed to timely controvert within the 28 day prescribed period thereby entitling Claimant to penalty fees of 10% under Section 14 (e).

H. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from March 13, 2004 to present, and continuing based on an average weekly wage of \$1,394.41, and a corresponding compensation rate of \$929.61.
2. Employer shall pay Claimant for all past employment and future reasonable medical care and treatment arising out of his work-related PTSD condition pursuant to Section 7(a) of the Act.
3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961. Employer shall also pay a 10% penalty under Section 14 (e) for failing to timely controvert.
4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge